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SEP 04 2008

OFFICE OF PETITIONS

In re Application of
Christine E. Krohn
Application No. 10/550,406
Filed: September 21, 2005
Attorney Docket No.: 2003UR016

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DECISION ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed on July 3, 2008, to revive the above-identified application. This petition also pleads in the alternative under 37 CFR 1.137(b) and is supplemented in a petition filed August 26, 2008.

The petition under 37 CFR 1.137(a) is **DISMISSED**.
The petition under 37 CFR 1.137(b) is **GRANTED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned on June 4, 2008, for failure to timely submit the issue fee as required by the Notice of Allowance and Issue Fee Due mailed March 3, 2008, which set a three (3) month statutory period for reply. Petitioner filed an Issue Fee Transmittal on April 4, 2008 with an authorization to charge petitioner's deposit account no. 05-1328 however at the time the Office attempted, there were insufficient funds in the account to do so. The publication fee was charged but as the issue fee was not timely paid, the application became abandoned. Accordingly, a Notice of Abandonment was mailed June 26, 2008.

In response, the present petition is filed accompanied by a declaration that the deposit account has been replenished and a further authorization to charge the petition fees and the issue fee. Petitioner asserts that they did not become aware that there were insufficient funds in the deposit account to cover the issue fee until April 15, 2008, after they'd already submitted the issue fee transmittal.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply, unless previously filed. In a nonprovisional application

abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;

- (2) the petition fee as set forth in § 1.17(l);
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and
- (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (c) of this section.

This petition lacks items (3) above.

SHOWING OF UNAVOIDABLE DELAY

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.¹

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where

¹In *re Mattullath*, 38 App. D.C. 497, 514-15 (1912)(quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.²

The showing of record is that the delay in payment of the issue fee occurred because there were insufficient funds in the deposit account. As it was petitioner's responsibility to ensure that the account contained sufficient funds to pay the items submitted, at the time of the submission, the account was insufficient nonetheless and petitioner has not presented an acceptable explanation for the deficiency.

Petitioner has not established that the delay was unavoidable. Rather than unavoidable delay, the record indicates a lack of diligence on the part of petitioner in maintaining an adequate balance in their deposit account. In order to establish unavoidable delay, petitioner must demonstrate diligence in prosecution of the matter,³ and the record does not establish that petitioner took all action necessary for prosecution of this application in satisfaction of 37 CFR 1.137(a). The showing presented is insufficient to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a). As petitioner has presented no showing of unavoidable delay, the petition will be dismissed.

Alternatively, since petitioner argues unintentional delay, and since all other requirements under 37 CFR 1.137(b) have been met, this matter is being forwarded to the Publishing Division to be processed into a Patent.

As the present petition was filed and decided under both 37 CFR 1.137(a) and (b) petitioner's deposit account no. 05-1328 has been charged in the amount of \$510.00 for treatment of the petition under 37 CFR 1.137(a) and in the amount of \$1540.00 for treatment of the petition under 37 CFR 1.137(b). As well, petitioner's deposit account has been charged in the amount of \$1440.00 for the issue fee.

Telephone inquiries concerning this matter should be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions

²Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

³See Douglas v. Manbeck, 21 USPQ2d 1697, 1700 (E.D. Pa. 1991), aff'd 975 F.2d 869, 24 USPQ2d 1318 (Fed. Cir. 1992).